David M. Spector, Esq.
Everett J. Cygal, Esq.
Robert C. Feldmeier, Esq.
Colin M. Proksel, Esq.
SCHIFF HARDIN LLP
233 South Wacker Drive
Chicago, Illinois 60606
Tel: (312) 258-5500

Brian J. Neff, Esq.
SCHIFF HARDIN LLP
900 Third Avenue
23rd Floor
New York, New York 10022
Tel: (212) 753-5000

Attorneys for Defendant, Counter-Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLARENDON NATIONAL INSURANCE COMPANY and CLARENDON AMERICA INSURANCE COMPANY, *Plaintiffs*, v. TRUSTMARK INSURANCE COMPANY *Defendant*.	
TRUSTMARK INSURANCE COMPANY *Defendant, Counter-Plaintiff*. v. CLARENDON NATIONAL INSURANCE COMPANY and CLARENDON AMERICA INSURANCE COMPANY, *Plaintiffs, Counter-Defendants*.	09 cv 9896 (BSJ-MHD)

TRUSTMARK'S MEMORANDUM OF LAW IN OPPOSITION TO CLARENDON'S MOTION FOR A PROTECTIVE ORDER, SATISFACTION OF JUDGMENT AND A STAY

INTRODUCTION

In its latest motion, Clarendon[1] asks the Court to deny effect to a lawful writ of execution, based on a valid, final judgment of a sister court, which Clarendon chose not to appeal ("Judgment"). Clarendon urges that its disputed claim that it satisfied the Judgment by setoff is sufficient to halt execution. As authority for this motion, Clarendon chiefly relies on N.Y. C.P.L.R. § 5240, which gives courts discretion to grant relief from executing a judgment in those rare cases where there is proof that immediate execution would impose egregious hardship on powerless individuals. Clarendon fails to provide any guidance as to how the Court should exercise this discretion. Nor does Clarendon address why Section 5240 (or the other rules it invokes) should apply to a commercial dispute between two sophisticated insurers.

These omissions are hardly surprising. The record lacks any evidence that Clarendon would suffer even minimal prejudice — much less irreparable harm — if Trustmark were allowed to enforce its Judgment. The sole basis Clarendon presents for the extraordinary relief it seeks is that it satisfied the Judgment by announcing to Trustmark, well after the Judgment was entered, that it was setting off the $6,645,648.00 against amounts due under other agreements. However, the validity of these setoffs remains the subject of cross-motions for summary judgment, with nearly 1,300 pages of briefs, affidavits and exhibits.

Far from proving prejudice, Clarendon conceded at last week's hearing that it was not concerned that Trustmark would be unable to return the money it was awarded in the Judgment if the Court were to rule adversely to Clarendon on the motions:

> THE COURT: But that's kind of a theoretical bookkeeping argument, isn't it? All you've done is said on our books we subtract 6.7 million from the 10.1.

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[1] The parties in this matter are Plaintiffs Clarendon National Insurance Company and Clarendon America Insurance Company, collectively "Clarendon," and Defendant Trustmark Insurance Company, "Trustmark."

> Are you suggesting that there is a real concern that is Trustmark actually seize 6.7 million in assets, that if the Court here ruled adversely to Trustmark on the overall issue, that you wouldn't be able to recover that $6.7?
>
> MR. LUDWIG: No, I don't think they are that solvency risk … .

(*Clarendon Nat'l Ins. Co. v. Trustmark Ins. Co.*, 09 cv 9896, Transcript of Hearing at 14:22-15:5 (Jan. 26, 2011), attached as Ex. 1 to Declaration of Brian J. Neff ("Neff Decl").)

On the other hand, Trustmark has presented evidence that it actually does face a solvency risk if it must await a payment of its Judgment until obtaining a favorable ruling on the motions. On December 28, 2010, insurance rating agency A.M. Best issued a press release stating that Clarendon had been "placed under review with negative implications" due to its impending acquisition by a foreign company. (Dec. 28, 2010, "A.M. Best Places Ratings of Clarendon Insurance Group Under Review With Negative Implications" attached as Ex. 2 to Neff Decl.)

The balance of equities, therefore, weighs in Trustmark's favor. The Court should deny Clarendon's unfounded Motion for a Protective Order, Satisfaction of Judgment and Stay and allow Trustmark to proceed with enforcing its writ of execution.

ARGUMENT

Clarendon cannot meet its high burden to prevent Trustmark from executing a valid, registered, federal court Judgment based merely on Clarendon's unproven allegation that it has satisfied the Judgment by setoff. First, Clarendon has not satisfied the Judgment. Second, Clarendon has not shown the prejudice required under Section 5240 to prevent Trustmark from executing the Judgment. Finally, Clarendon cannot obtain a stay under Federal Rule of Civil Procedure 62(b)(4) because it cannot demonstrate irreparable harm from being required to comply with a valid judgment.

I. CLARENDON HAS NOT SATISFIED THE ILLINOIS JUDGMENT

Clarendon's arguments to prevent Trustmark from enforcing the Judgment all rest on the same faulty premise: that it has satisfied the Judgment by setoff. (Mem. at 2, 6-7.[2]) But setoff is a contested issue in this litigation and one that has never been decided in Clarendon's favor. Indeed, both the arbitration panel and the Northern District of Illinois have denied Clarendon's claim for setoff.[3]

A. Only a Cash Payment Can Satisfy Trustmark's Money Judgment

Clarendon has not satisfied the Judgment because it has not paid Trustmark. The Judgment is "an obligation for the payment of money." *See Dowling v. Hastings*, 105 N.E. 194, 195 (N.Y. 1914). Clarendon has one option to satisfy the Judgment: "the only way a money judgment can be satisfied is by payment in money, unless the parties agree otherwise." 47 Am. Jur. 2d Judgments § 816.[4] Clarendon has not paid Trustmark nor has Trustmark agreed to accept any substitute for money.

Contrary to Clarendon's assertion, it cannot satisfy the Judgment by claiming setoff in the pending lawsuit. Not only are those allegations disputed (as discussed in the voluminous summary judgment briefing before this Court) but also "[i]t is the general rule that a mere

[2] Clarendon's Memorandum of Law in Support of Its Motion for a Protective Order, for Satisfaction of Judgment Under Rule 60(b)(5), and for a Stay Under Rule 62(b)(4), "Mem."

[3] Clarendon's claim that it "did not object to confirmation of the award, so long as it was recognized that Clarendon had already satisfied the award" makes no sense. (Mem. at 2.) The Northern District entered Judgment, and denied Clarendon's claim for setoff, because Clarendon had not satisfied the Award.

[4] *Accord Home State Bank/Nat'l Ass'n v. Potokar*, 617 N.E.2d 1302, 1305 (Ill. App. Ct. 1993); *Heller v. Lee*, 474 N.E.2d 856, 857 (Ill. App. Ct. 1985). *See also* 50 C.J.S. § Judgments 872 (2009) ("As a general rule, a judgment for the payment of money can be satisfied only in money, unless the judgment provides for, or the owner of the judgment agrees to, some other mode of payment.").

unliquidated claim cannot be used to satisfy a judgment." *D&B Enters. No. 2 v. Cablam, Inc.*, 729 N.Y.S.2d 522, 523 (N.Y. App. Div. 2001); *see also Willett v. Lincolnshire Mgmt., Inc.*, 756 N.Y.S.2d 9, 10 (N.Y. App. Div. 2003) ("[T]here is no right to set off a possible, unliquidated liability against a liquidated claim that is due and payable ..." (citations omitted)).[5] Clarendon's contingent, unliquidated claims, cannot prove satisfaction by setoff.

B. Clarendon Did Not Comply with Any Legal Requirements for Satisfaction

Clarendon cannot satisfy a judgment merely by informing Trustmark that the Judgment is satisfied by setoff. In the Northern District of Illinois, satisfaction of a judgment is a formal clerk-prescribed procedure, governed by Local Rule 58.1. (Attached as Ex. 3 to Neff Decl.) The clerk never entered a satisfaction in this case. Instead, the clerk certified the Judgment for registration in another district so that Trustmark could enforce it. When Trustmark registered the Judgment in the Southern District of New York under 28 U.S.C. § 1963, Clarendon could have registered a certified copy of the satisfaction of the Judgment. Again, it has not done so.

II. NEITHER A PROTECTIVE ORDER NOR A STAY IS PROPER UNDER SECTION 5240

Section 5240 permits a court on motion to "make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." N.Y. C.P.L.R. § 5240 (McKinney 2011). However, Section 5240 "is a remedial tool that a court *may* use." *In re Persky*, 893 F.2d 15, 18 (2d Cir. 1989) (emphasis in original). The Court's discretion under this provision "must be used sparingly." 54 N.Y. Jur. 2d Money Judgments § 327. Although Clarendon repeatedly invokes the Court's discretionary equitable powers under Section

[5] Clarendon cites cases for the proposition that "New York law allows setoff when debts are mutual and liquidated." (Mem. at 7.) These cases are inapposite because the debts here are not mutual and liquidated. At this point, the only liquidated debt is the Judgment Clarendon owes to Trustmark.

5240, it refrains from advising the Court of the narrow circumstances under which the Court may exercise those powers because those circumstances are absent here.

A. Section 5240 Provides Relief Only Under Extreme Circumstances that Are Not Present Here

Section 5240 "is plainly designed to prevent the *brutal* use of legal procedures against a judgment debtor." *Midlantic Nat'l Bank/North v. Reif*, 732 F. Supp. 354, 356 (E.D.N.Y. 1990) (emphasis added). Contrary to Clarendon's contentions, courts have applied Section 5240 when an individual faces oppressive, unnecessarily harsh, enforcement procedures that threaten irreparable harm.[6] Thus, courts use Section 5240 to prevent families from being forced out of their homes. *See e.g.*, *id.* at 357 (execution procedure "reeked of Dickensian squalor because of the immediate and unavoidable consequences to the innocent mother and child"); *Seyfarth v. Bi-county Elec. Corp.*, 341 N.Y.S.2d 533, 535 (N.Y. Sup. Ct. 1973) (Section 5240's "purpose is to protect persons from unnecessarily harsh use of legal procedures. Perhaps nowhere is this more pertinent than in the area of unredeemable sheriff's sales of residential property"); *Holmes*, 336 at 602 (allowing stay because "the forced sale of a family home housing two adults and four teenage children will result in serious disruption and loss of family security").

[6] *See, e.g., Tokio Marine & Fire Ins. Co. Ltd. v. Rosner*, No. 02-cv-5065 (RJD), 2007 WL 4373240, at *4 (E.D.N.Y. Dec. 10, 2007) (harmonizing "the debtor's interest in avoiding irreparable family harm with the legitimate interest of the creditor in securing payment of its valid debt") (citations omitted); *Heymann v. Brechner,* No. 96 Civ. 1329 (CSH),1996 WL 580915, at *7 (S.D.N.Y. Oct. 9, 1996) ("To act in accordance with CPLR § 5240, I must harmonize the debtor's interest in avoiding irreparable family harm with the legitimate interest of a creditor in securing payment of a valid debt"); *Moskin v. Midland Bank & Trust Co.*, 409 N.Y.S.2d 327, 327 (N.Y. Sup. Ct. 1978) ("[T]he exercise of the discretionary power granted by CPLR 5240 requires harmonizing the judgment debtor's interest in avoiding irreparable ... harm . .. with the legitimate interest of a creditor in securing payment of a valid debt" (quoting *Holmes v. W.T. Grant. Inc*., 71 Misc. 2d 486, 487 (N.Y. Sup. Ct. 1972)).

Relief under Section 5240 has also been granted where the debtors were individuals, and the asset involved was essentially the right of the individual to work in her profession. *See, e.g., Tokio Marine*, 2007 WL 4373240, at *5 (physician's place of practicing medicine); *Commercial Credit Dev. Corp. v. Bailey*, 437 N.Y.S. 2d 183 (N.Y. App. Div. 1981) (a lawyer's partnership interest in his law firm); *Moskin*, 409 N.Y.S. 2d at 328 (a broker's seat at a stock exchange).

These extreme circumstances are not present here and, in fact, underscore the impropriety of the relief requested by Clarendon. Although paying the Judgment may be unpleasant to Clarendon, doing so will not inflict the irreparable harm considered by courts that have granted Section 5240 relief.

B. Clarendon Has Made No Showing of Disadvantage or Prejudice

Even if it were appropriate for Clarendon to invoke Section 5240 under the present circumstances, Clarendon still must show "substantial hardship and unfair burden in meeting obligations" to obtain Section 5240 relief. *Nord v. Berman*, No. 6306/91, 2004 WL 2282487, at *1 (Dist. Ct. Oct. 8, 2004). However, Clarendon fails to identify any disadvantage or prejudice other than its contention that enforcing Trustmark's writ of execution may temporarily deprive Clarendon of its purported right of setoff. (Mem. at 8-9.) As Trustmark has demonstrated at length, a party cannot setoff claims that are "contingent, possible, and/or *in futuro*", such as those being litigated here, against sums reduced to judgment. (*See* Memorandum of Law Supporting Trustmark's Motion for Summary Judgment (Docket # 71), at pp. 10-12, 31-34.)

Clarendon's contingent claims cannot support its petition for relief under Section 5240. In *Santagelo v Estate of Goldman*, 681 N.Y.S.2d 753 (N.Y. App. Div. 1998), the Supreme Court denied a judgment debtor's motion to vacate the judgment and allowed the judgment creditor to execute. The Appellate Division affirmed, noting that:

> Even if we were to view defendants' motion as one seeking to limit enforcement of the judgment pursuant to CPLR 5240, the authority provided by that section is not sufficiently plenary to allow a court acting thereunder to reduce the judgment to the extent of an unadjudicated offset claimed by the judgment debtor.

Id. Clarendon's temporary loss of unadjudicated setoff claims, which it may or may not prove valid, does not constitute prejudice cognizable under Section 5240. Nor does Clarendon identify what harm it might suffer if it pays the Judgment immediately. Clarendon has utterly failed to carry its burden of proof under Section 5240.

C. The Balance of Equities Favors Trustmark

Courts deciding motions under Section 5240 also must weigh the competing equities to decide whether the "execution procedure strikes a fair balance between the needs of a creditor holding a valid money judgment and the needs of a debtor managing competing financial obligations." *Midlantic Nat'l Bank/North,* 732 F. Supp. at 357. *See also supra at* fn.5. In the present case, the balance of equities tips decidedly in Trustmark's favor.

As demonstrated above, Clarendon has failed to identify any inordinate harm it will suffer if Trustmark is allowed to enforce its writ of execution. If, however, Clarendon succeeds in delaying enforcement of the writ, Trustmark may be left with an uncollectable judgment against an insolvent debtor. (Neff Decl., Ex. 2.) Such imbalance in the equities militates in favor of enforcing the writ. *See In re Pandeff*, 201 B.R. 865, 869 (S.D.N.Y. 1996) (quoting decision in which New York Supreme Court denied stay under Section 5240 where debtor made no showing of prejudice and creditor would be prejudiced by granting stay).

III. CLARENDON CANNOT OBTAIN RELIEF UNDER RULE 62(b)(4)

Clarendon simultaneously seeks: (i) Rule 60(b)(5) relief from the Judgment claiming that it "has satisfied the judgment" and (ii) a stay of execution under Rule 62(b)(4) pending resolution of the Rule 60(b)(5) motion. (Mem. at 5, 10-11.) But Clarendon cannot meet its burden for any of the relief that it seeks.

Conspicuously absent from Clarendon's brief is the Rule 62(b) standard to stay enforcement of a judgment. Instead, Clarendon argues without support that "New York courts do not analyze the issue as ... requiring a showing of likelihood of success on the merits, irreparable harm, and the public interest." (Mem. at 8.) Clarendon repeatedly urges that a stay does not require a showing of irreparable harm. (*Id.* at 4-5, 8, 12.) But Clarendon's own case law demonstrates that Clarendon is wrong. (*Id.* at 12, citing *Frankel v. I.C.D. Holdings S.A.*, 168 F.R.D. 19, 22 (S.D.N.Y. 1996).)

In *Frankel*, the Court listed the "factors that traditionally inform the exercise of a court's discretion with respect to the issuance or denial of a stay" under Rule 62: "likelihood of success, *the threat of irreparable harm* to either side, and the public interest." 168 F.R.D. at 21 (emphasis added); *see also U.S. v. Goldstein*, No. 03 Civ. 9316, 2004 WL 2199507, at *2 (S.D.N.Y. Sept. 29, 2004) (denying Rule 62(b) motion to stay where movants could not show "likelihood of success" or "threat of irreparable injury").[7] This Court already expressed skepticism regarding Clarendon's ability to meet this test.

> As a practical matter, unless you get a court order staying the execution, I gather from what you've said up to now you have no irreparable harm, I'm not entirely clear that there's going to be a basis for your motion to prevail.
>
> (Neff Decl., Ex. 1, at 24:21-24.)

Clarendon can no longer side-step its burden to obtain a stay.

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[7] The Supreme Court recently outlined the "traditional test for stays" as: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. ___, 129 S.Ct. 1749, 1760-61 (2009). This test too requires a showing of irreparable harm.

A. Clarendon Is Unlikely to Succeed on the Merits of Its Rule 60(b)(5) Motion

Clarendon must make "a strong showing of likelihood of success on the merits" of its Rule 60(b)(5) motion, which requires "more than a mere possibility of relief." *Nken*, 129 S.Ct. at 1761 (internal citations and quotations omitted). However, Clarendon's Rule 60(b)(5) motion necessarily fails because Clarendon did not satisfy the Judgment. Lacking any evidence that it satisfied the Judgment, Clarendon points to its allegations in the pending declaratory judgment action. (Mem. at 10.) But Clarendon's allegations in a lawsuit are not sufficient to prove satisfaction in accordance with Rule 60(b)(5) because paying Trustmark is the only way that Clarendon can satisfy the Judgment (as explained above).

Clarendon's self-proclaimed satisfaction does not meet the showing required for "extraordinary judicial relief" under Rule 60(b)(5). *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) (quotations and citations omitted). Courts will disrupt the sanctity of a judgment "only if the moving party demonstrates exceptional circumstances, and relief under the rule is discretionary." *Id.* (quotations and citations omitted); *see also* Fed. R. Civ. P. 60(b)(5) ("the court *may* relieve …") (emphasis added). Clarendon must show "highly convincing evidence in support of the motion." *Bernstein v. Appellate Div. First Dep't Disciplinary Comm.*, No. 07 Civ. 11196(SAS), 2010 WL 5129069, at *1 (S.D.N.Y. Dec. 15, 2010) (quotations and citations omitted).[8] Clarendon has not come close.

Moreover, "the discretionary relief available under Rule 60(b) is equitable." *Motorola*, 561 F.3d at 127. When, as here, "[Defendants] have time and again deployed their lawyers to raise legal roadblocks to the enforcement of the judgment against them" a court will deny a Rule

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[8] Moreover, "motions for relief from judgment under Rule 60(b) are generally disfavored in the Second Circuit." *Id.* (citations omitted); *see also* Wright, Miller & Kane, *Federal Practice & Procedure*, § 2863 (West 2010) (noting that courts "very rarely" grant Rule 60(b)(5) relief).

60(b)(5) motion. *Id.* For almost two years, Clarendon has avoided the Judgment and it still lacks "highly convincing evidence" that it satisfied the Judgment. *Bernstein*, 2010 WL 5129069, at *1. Clarendon's Rule 60(b)(5) motion is unlikely to succeed.

B. Clarendon Will Not Be Irreparably Injured if the Judgment Is Executed

Clarendon cannot show any irreparable injury if the Court does not stay the execution. The Judgment is for money and "[i]rreparable injury is one that cannot be redressed through a monetary award." *J.S.G. Trading Corp. v. Tray Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir.1990). Even if the Court later finds that the Judgment has been satisfied, then Trustmark can be ordered to reimburse Clarendon. A "harm that can be remedied by a money judgment or at the end of trial is not an irreparable harm." *Kermanshah v. Kermanshah*, No. 08-CV-00409 (BSJ)(AJP), 2008 WL 4787494, at *2 (S.D.N.Y. Oct. 24, 2008) (quoting *Sung Chul Lee v. Daniel S. Choi*, 140 Fed. Appx. 299, 300 (2d Cir. 2005)). As Clarendon has already admitted, Trustmark is not a credit risk, and therefore Clarendon cannot show irreparable harm.[9] (Neff Decl., Ex.1 at 14:22-15:5.)

C. The Public Interest Favors Enforcing the Judgment

Issuing a stay while Clarendon's Rule 60(b)(5) motion is pending does not serve the public interest. Under Clarendon's novel theory for obtaining Rule 60(b)(5) relief, a party could merely announce that it had unilaterally satisfied an enforceable judgment by means of whatever setoff it could imagine and thus prevent the collection of that otherwise enforceable judgment. *See Frankel*, 168 F.R.D. at 21 (denying stay and finding "entirely unpersuasive" the judgment debtor's argument "that plaintiff should be precluded from enforcing their judgment ... because [the judgment debtor] may eventually recover against plaintiffs in its subsequently filed action").

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[9] Trustmark, however, may be irreparably harmed if the Judgment is stayed because Clarendon is a credit risk. (Neff. Decl., Ex. 2.) The Judgment here is substantial and growing — Clarendon owes Trustmark $6,645,648 plus $1,120,837 in interest through February 1, 2011 (a total of $7,766,485) and accruing at $1,638.65 per day.

The public interest is far better served by maintaining the enforceability of valid judgments, rather than letting parties spin out of whole cloth unsupported and unregulated self-help remedies.

CONCLUSION

For the foregoing reasons, Trustmark requests that this Court enter an order (i) denying Clarendon's Motion for a Protective Order, for Satisfaction of Judgment Under Rule 60(b)(5), and for a Stay Under Rule 62(b)(4), and (ii) allowing Trustmark to enforce its Judgment by writ of execution. Finally, Trustmark requests any such other relief as the Court deems just and proper under the circumstances, including its attorneys' fees and costs.

DATED: February 1, 2011

SCHIFF HARDIN LLP

By: /s/ Brian J. Neff

David M. Spector, Esq.
Everett J. Cygal, Esq.
Robert C. Feldmeier, Esq.
Colin M. Proksel, Esq.
SCHIFF HARDIN LLP
233 S. Wacker Drive
Chicago, Illinois 60606
Tel: (312) 258-5500
Fax: (312) 258-5600

Brian J. Neff, Esq.
SCHIFF HARDIN LLP
900 Third Avenue
23rd Floor
New York, New York 10022
Tel: (212) 753-5000
Fax: (212) 753-5044

ATTORNEYS FOR THE
TRUSTMARK INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2011, a copy of foregoing Memorandum of Law in Opposition to Clarendon's Motion for a Protective Order, for Satisfaction of Judgment under Section 60(b)(5), and for a Stay under Section 62(b)(4), was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system. Parties may access this filing through the court's CM/ECF System.

/s/ Brian J. Neff
Brian J. Neff (BN 9568)
Schiff Hardin LLP
900 Third Avenue
23rd Floor
New York, New York 10022
Tel: (212) 753-5000Email:

Attorneys for Trustmark Insurance Company